34. The attitudes reflected in these studies have had a concrete effect on U-verse sales in San Diego. San Diego's average monthly rate of sales per thousand living units—**[highly confidential*** ***end]**—is **[highly confidential*** ***end]** percent lower than the median rate of **[highly confidential*** ***end]**. *See* Sambar Decl. ¶ 10. Indeed, San Diego's sales rate is **[highly confidential*** ***end]**. *See id.* Further, a January 2008 door-to-door salesperson survey reports that, of **[highly confidential*** ***end]** potential customers who declined to purchase U-verse TV, **[highly confidential*** ***end]** cited the lack of Padres programming as the reason for their decision. *See id.* at Ex. 5.

35. Moreover, Cox's refusal to provide access to Padres programming has had a marked detrimental impact on AT&T's customer retention. AT&T's disconnect ("churn") rate in San Diego has been significantly higher in every single month of operation than in other areas in which AT&T offers U-verse. For the past year, for example, the average monthly U-verse churn rate in **[highly confidential*** ***end]** has been **[highly confidential*** ***end]** percent, while the churn rate for San Diego has been **[highly confidential*** ***end]** percent—almost **[highly confidential*** ***end]** percent higher. *See id.* ¶ 11. AT&T also has suffered a higher rate of order "cancellations" in San Diego—*i.e.*, instances where a prospective subscriber cancels a service order before U-verse service has been activated. *See id.* ¶ 26.

36. Much of this increased loss of existing and prospective customers can be directly attributed to the lack of Padres programming. Based on data collected in March through May of 2008 by AT&T's customer-retention "save team," **[highly confidential*** ***end]** percent

of subscribers who disconnected, and **[highly confidential*** ***end]** percent of subscribers who canceled service, cited the lack of Padres programming as the reason. *See id.* ¶ 9 & Ex. 6. This has become such a significant concern for AT&T that it has been forced to modify its point-of-sale disclosures to require customers to affirm, in writing, that they have been advised that U-verse TV does *not* include Padres programming. Customers subscribing over the phone must listen to this same explicit disclosure. *See id.* ¶ 12 & Ex. 8.

37. These lost customers are having a significant impact on AT&T's revenues in San Diego. AT&T estimates that the loss of existing and prospective customers during the period from September 2007 through July 2008 has resulted in over **[highly confidential*** ***end]** in lost present and expected revenues, and nearly **[highly confidential*** ***end]** lost sales, cancelled orders, and service disconnections. *See id.* ¶¶ 21-32 & Ex. 7.

38. In short, Cox's refusal to license Cox-4 directly impedes AT&T's ability to add a viable competitive MVPD voice in San Diego—one that could offer new satellite-delivered programming as well as other programming.

D. Cox's Actions Are Anticompetitive In Intent.

39. Cox is clearly aware of, intends, and capitalizes on the handicap it has created. Cox publicly touts in San Diego the fact that it is the sole provider in its core service area that offers access to Padres games.

40. Cox's website, for example, advertises Cox-4 as "All Padres … All HD … All the time … **only on cable!**" *See* Sambar Decl. ¶ 13 & Ex. 9 (emphasis in original). This statement appears in Cox's email advertising too. *See id.* at Ex. 10. And the company's website proclaims

that "Cox values its partnership with the local community and will give you the best coverage of local sports with Channel 4 San Diego, including 150 Padres games in HD. *You won't find that on satellite.*" *See id.* at Ex. 9, at 5 (emphasis in original). Cox's television advertising similarly touts its exclusive access to Padres programming. *See id.* at Ex. 11.

41. Furthermore, Cox licenses Cox-4, including the Padres games, to Time Warner, which provides incumbent cable services in areas adjacent to Cox's San Diego footprint but does not compete with Cox.[10] In other words, Cox is affirmatively in the business of selling Cox-4 programming—but it withholds such programming where it believes doing so will give it the ability to undermine competing video services. As noted above, Craig Nichols of Cox stated directly in an email that it was Cox's policy to refuse to license Cox-4 to "non-wireline or telco cable providers." *See supra*, at ¶ 27. In short, and as documented by the Commission, Cox refuses to sell Cox-4 programming both to AT&T and to direct broadcast satellite ("DBS") providers serving San Diego[11]—and uses this to its advantage in trying to retain or win back customers.

42. The Commission has found, and Cox is therefore undeniably aware (as its advertising demonstrates), that withholding key regional sports network ("RSN") programming detrimentally affects video competition—including competition for the provision of satellite-

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10 While Cox and Time Warner are legally entitled to compete against one another throughout the state, as a practical matter, their footprints overlap only within one neighborhood in San Diego, which accounts for less than one percent of the cable franchise footprint. *See* Sambar Decl. ¶ 14. Notably, Time Warner's advertising in San Diego, like that of Cox, trumpets that Cox-4 is available "exclusively on cable." *See id.* & Ex. 13 at 1-3.

11 *See 2007 Program Access Order*, 22 FCC Rcd at 17817 ¶ 39 ("[T]here is factual evidence that cable operators have withheld [RSN] programming from competitors and, in two instances—in San Diego and Philadelphia—there is empirical evidence that such withholding has had a material adverse impact on competition in the video distribution market.").

delivered programming. Regional sports programming is among the "cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes."[12] As the Commission has explained, this is because RSNs "typically purchase *exclusive rights* to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[13]

43. The Commission has recognized that a provider's ability to retain customers "would be jeopardized" without this programming.[14] It found that "there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN"[15] and that "lack of access to RSN programming can decrease an MVPD's market share significantly because a large number of consumers will refuse to purchase the MVPD's service and will instead elect to purchase service from the cable operator that offers the RSN."[16]

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[12] *Id.* at 17816 ¶ 38.

[13] Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, 535 ¶ 133 (2004) ("*General Motors Order*") (emphasis added). *See also* Brief for Respondent Federal Communications Commission, *Cablevision Systems Corporation v. FCC*, Nos. 07-1425 & 07-1487, at 35 (D.C. Cir. Aug. 13, 2008) ("*FCC Cablevision Brief*") ("[A] baseball fan who wants to watch the local team's games on a cable-controlled RSN [will not] be satisfied by different sports channels featuring different teams.").

[14] *See, e.g.*, *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this 'must have' programming, their ability to retain subscribers would be jeopardized.").

[15] Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, from Adelphia Commc'ns Corp. to Time Warner Cable, Inc.*, 21 FCC Rcd 8203, 8271 ¶ 151 (2006) ("*Adelphia Order*"); *see also id.* at 8258-59 ¶ 124 ("RSNs are often considered 'must-have programming' … Hence, an MVPD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals.").

[16] *2007 Program Access Order*, 22 FCC Rcd at 17817 ¶ 39 (citing *Adelphia Order*, 21 FCC Rcd at 8267-72 ¶¶ 140-51 & 8341-50, Appendix D).

44. To put this in more concrete terms, the Commission has noted that between 40 and 48 percent of cable subscribers would be less likely to subscribe to an MVPD service that lacks local sports programming.[17] For example, "without access to the cable-affiliated RSN in Philadelphia, the percentage of television households that subscribe to DBS service in Philadelphia is 40 percent below what would otherwise be expected."[18]

45. The Commission repeatedly has found that the withholding of Cox-4 in particular has adversely affected video competition in San Diego. In the *Adelphia Order*, for example, the Commission concluded that "[i]n the San Diego DMA, lack of access to RSN programming is estimated to cause a 33% reduction in the households subscribing to DBS service."[19] In the *2007 Program Access Order*, the Commission noted a similar market-share impact on competitive MVPDs generally: In San Diego, "the collective market share of competitive MVPDs is well below their national average of 33 percent," and is instead 13.7 percent.[20] And in a brief filed just last month in the D.C. Circuit, the Commission explained that "the Philadelphia and San Diego examples provide 'empirical evidence' … that the withholding of just a single network can impair the ability of competitive MVPDs to attract subscribers."[21]

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17 *General Motors Order*, 19 FCC Rcd at 535 ¶ 133 & n.394.

18 *2007 Program Access Order*, 22 FCC Rcd at 17817-18 ¶ 39 (citing *Adelphia Order*, 21 FCC Rcd at 8271 ¶ 149).

19 *Adelphia Order*, 21 FCC Rcd at 8271 ¶ 149; *see also 2007 Program Access Order*, 22 FCC Rcd at 17817 ¶ 39 ("In San Diego, … lack of access to [Cox-4] results in a 33 percent reduction in the households subscribing to DBS service.").

20 *2007 Program Access Order*, 22 FCC Rcd at 17817-18 ¶ 39 n.196 (citing data from Nielsen Media Research).

21 *FCC Cablevision Brief* at 38.

46. Cox has a particular incentive to withhold programming and drive AT&T out of San Diego, or at least weaken it as a local competitor. Cox is well aware that AT&T's presence in San Diego stands to create significant cable price discipline for Cox. As the Commission and others have noted, markets with wireline competition have significantly lower cable prices than those with only DBS competition.[22] Further, AT&T stands poised to offer "triple-play" competition to Cox, capturing not only video customers but lucrative broadband and VoIP customers as well.[23] Indeed, Cox is now offering its own high-speed Internet customers exclusive access to "Padres.TV"—a special service allowing Cox subscribers to watch all Padres games online. *See* Sambar Decl. ¶ 13 & Ex. 12.

VI. LEGAL ARGUMENTS

A. Cox's Refusal To Deal Violates Section 628(b) Of The Communications Act.

47. Given the facts above, Cox's refusal to deal with AT&T violates Section 628(b) of the Communications Act. Specifically, the withholding of Cox-4 is an unfair method of competition that has both the purpose and effect of significantly hindering AT&T's ability to provide *satellite-delivered* programming to consumers in San Diego.

48. This conclusion follows naturally from the Commission's recent *MDU Order*, in which the Commission made clear that Section 628(b) precludes *any* type of conduct that hinders competition for the provision of satellite-delivered programming *to customers*—and not simply

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22 *See* Part VI.A.4, *infra* (discussing Commission orders and GAO reports showing that wireline competitors provide the most significant price discipline to cable operators and create pressure for cable operators to enhance their services and improve customer service).

23 *MDU Order*, 22 FCC Rcd at 20245 ¶ 19 ("LEC entry is also likely to result in increased deployment of fiber to American homes at lower cost per residence, and a new competitor offering the 'triple play' bundle of video, voice, and Internet access service.").

conduct that limits *competitors'* access to such programming.[24] There, the Commission found that contract clauses giving cable operators exclusive access to apartment buildings and other MDUs are inconsistent with (and redressable through) Section 628(b) because, even though they do not limit competitive MVPDs' access to satellite-delivered programming, exclusivity clauses necessarily limit competition for the delivery of that programming to consumers.[25] The Commission also found that Section 628(c)(1) specifically requires the Commission to read Section 628(b) expansively so as to serve the statute's explicit public interest goals of enhancing diversity and competition in the video distribution market.[26]

49. By the same token, the Commission has acknowledged repeatedly that unfair and/or anticompetitive conduct with respect to terrestrially-delivered programming may be found to violate Section 628(b) if the purpose and/or effect of such conduct is to hinder competitive MVPDs' efforts to provide satellite-delivered programming. As shown above, the facts here allow for no other conclusion: Cox is withholding terrestrially-delivered programming for the purpose of defeating competition from other providers of satellite-delivered programming in its service area, and its efforts are meeting with success, to the detriment of consumers.

50. For this reason, this Complaint need not and does not seek to have the Commission close the so-called "terrestrial loophole," an issue pending in the general program access rulemaking proceeding.[27] It is not necessary to resolve here whether Section 628(b) can

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24 *Id.* at 20256 ¶ 44.

25 *Id.* at 20237 ¶ 4.

26 *Id.* at 20255 ¶ 42; *see also* Brief for Respondent Federal Communications Commission, *NCTA v. FCC*, Nos. 08-1016 & 08-1017, at 10 (D.C. Cir. July 25, 2008).

27 *Cf.* Comments of AT&T, Inc., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, filed in MB Docket No. 07-198, Jan. 4,

be read to directly preclude exclusive contracts for terrestrially-delivered programming in all circumstances. Withholding of this *particular* terrestrially-delivered programming directly depresses competition for satellite-delivered video programming in San Diego, and thus, on its face, directly contravenes the plain language of Section 628.

1. The Commission Has Made Clear That Section 628(b) Broadly Prohibits *Any* Conduct That Unfairly Depresses Competition For The Provision Of Satellite Video Programming.

51. Section 628(b) provides that it "shall be unlawful for a cable operator [or] a satellite cable programming vendor in which a cable operator has an attributable interest ... to engage in *unfair methods of competition* or *unfair* or deceptive *acts or practices*, the purpose *or effect of which* is to *hinder significantly* or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[28]

52. In the *MDU Order*, the Commission made clear that Section 628(b) broadly proscribes *any* "unfair methods of competition with the purpose or effect of hindering significantly or preventing MVPDs from providing satellite cable and broadcast programming to consumers." *MDU Order*, 22 FCC Rcd at 20255 ¶ 43 n.132. The *MDU Order* also clarified that an "unfair method of competition or unfair act or practice" under Section 628(b) includes efforts "to impede the entry of competitors into the market and foreclose competition based on the

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2008; Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791, 17859-61 ¶¶ 115-17 (2007).

[28] 47 U.S.C. § 548(b) (emphasis added).

quality and price of competing service offerings." *Id.* at 20255 ¶ 43; *see also id.* at 20249 ¶ 27 (discussing the unfairness of "[f]oreclosing competition" and depriving consumers of choice).

53. The *MDU Order* demonstrates that such unfair acts or practices are *not* confined to those that directly involve the cable operator's or programming vendor's withholding of satellite-delivered programming. To the contrary, the Commission held that the statute must be read to bar cable operators from engaging in *other* conduct that has the effect of frustrating *competitors'* efforts to provide satellite-delivered programming to customers:

> [T]he Commission's authority under Section 628(b) is not restricted to unfair methods of competition or unfair or deceptive practices that deny MVPDs access to programming. Section 628(b) is not so narrowly drawn. Anticompetitive practices can hinder or prevent MVPDs from providing programming to consumers either by blocking their access to programming *or by blocking their access to consumers*, and there is nothing in Section 628(b) that suggests that the Commission's authority is limited to the former.... *[A]ny practices that unfairly deny MVPDs the ability to provide such programming to consumers are prohibited.*

Id. at 20256 ¶ 44 (emphasis added). Importantly, the Commission distinguished Section 628(b) from Section 628(c)(2)(D), characterizing the latter as "narrowly drawn" and focusing "explicitly on conduct that impairs MVPDs' access to programming," but characterizing Section 628(b) as much broader and reaching "any practices that unfairly deny MVPDs the ability to provide such programming to consumers." *Id.* The Commission found that Section 628(c)(1) requires this reading, because it directs the Commission to adopt rules under Section 628(b) that "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market." *Id.* at 20255 ¶ 42. To that end, the Commission also found that Section 628(c)(1) "grants the Commission *wide latitude* to specify particular conduct that is prohibited by Section 628(b)." *Id.* at 20258 ¶ 48 (emphasis added) (alterations omitted).

54. Accordingly, the Commission found that "clauses that grant cable operators exclusive access to MDUs and other real estate developments fall within the scope of Section 628(b), because those clauses effectively prohibit new entrants into the MVPD market from providing satellite-delivered programming to consumers who live in MDUs and other real estate developments." *Id.* at 20237 ¶ 4.

55. Under this rationale, other conduct that hinders a competitor's ability to provide satellite-delivered programming to customers must also fall directly within the reach of Section 628(b). No less than an exclusive building contract, Cox's conduct in San Diego interferes with AT&T's efforts to enter and establish a foothold in the video programming distribution market. Cox's behavior ensures that AT&T effectively will be "blocked" in its "access to consumers,"[29] because AT&T's service lacks a component many consumers consider essential. Competition and diversity in satellite-delivered video programming are thus degraded. The Commission has full power and authority to redress this harm under Section 628(b), and it should do so promptly.

2. The Commission Has Recognized That Conduct Involving Terrestrially-Delivered Programming Can Implicate Section 628(b) By Hindering The Provision Of Satellite-Delivered Programming.

56. The Commission's orders expressly recognize that the withholding of terrestrially-delivered programming can violate Section 628(b). Indeed, the Commission previously has entertained program access complaints on this basis. Although it found that the specific facts alleged in those earlier cases were not sufficient to demonstrate a violation, here the facts show that Cox's conduct is both intended to, and has the effect of, significantly

29 *MDU Order*, 22 FCC Rcd at 20256 ¶ 44.

hampering competition in San Diego. This case thus amply satisfies the test articulated by the Commission in those earlier cases, and further refined in the *MDU Order*.

57. For example, in its *DirecTV v. Comcast* decision, the Commission acknowledged that cable operators could violate Section 628(b) by denying access to programming on the basis of the terrestrial "loophole."[30] The Commission rejected DirecTV's complaint concerning Comcast's terrestrially-delivered programming, but it did so on factual grounds ("the facts alleged are not sufficient to constitute such a violation here"), while at the same time noting expressly that "there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming."[31]

58. The Commission reiterated this position in the *RCN* case, finding that the withholding of certain terrestrially-delivered programming could violate Section 628(b) "if it preclude[s] competitive MVPDs from providing satellite cable programming."[32] Again, while the Commission rejected the complaint on the basis that "the facts alleged are not sufficient to constitute such a violation here,"[33] it nevertheless entertained the complaint as a legal matter, making clear that such a claim was legally cognizable if properly supported.

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30 Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802, 22806-07 ¶¶ 10, 13 (2000) ("*DirecTV Order*").

31 *Id.* at 22807 ¶ 13.

32 Memorandum Opinion and Order, *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd 12048, 12053 ¶ 15 (2001) (addressing claim that programming was moved from satellite to terrestrial delivery).

33 *Id.*

59. To be sure, the Commission in those cases focused on the question of whether the defendants had shifted programming from satellite to terrestrial distribution in an effort to evade the program access rules. But there is no logical reason that such anticompetitive conduct is any more a violation of Section 628(b) than Cox's conduct here. While the plaintiffs in *RCN* and *DirecTV* alleged that moving the programming to terrestrial delivery was specifically designed to avoid Section 628(b)'s reach, Section 628(b) does not require anything of the sort: That prohibition is violated if conduct is (1) anticompetitive, and (2) has the effect or purpose of hindering the provision of satellite-delivered programming—all facts AT&T has shown here. This is expressly confirmed by the Commission's decision in the *MDU Order*, which makes clear that Section 628(b) is broad enough to reach *any* type of anticompetitive behavior that significantly hinders a competitive video provider's ability to supply satellite-delivered cable programming to consumers. *MDU Order*, 22 FCC Rcd at 20255 ¶ 43 & n.132.

60. That is no less true for anticompetitive acts involving terrestrially-delivered programming than it is for exclusive building contracts. In both cases, conduct not specifically prohibited by the Act may nevertheless violate the Act by disabling competitors from offering competitive video subscription services, thereby frustrating Section 628. As the Commission has explained, "[w]e … have long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming."[34]

[34] *General Motors Order*, 19 FCC Rcd at 535 ¶ 133.

61. The Commission has recognized expressly that it has the power to act to enforce Section 628(b)'s prohibition above and beyond the power granted to the Commission in the more restrictive provisions of Section 628(c), which are concerned with ensuring that MVPDs have *access* to satellite-delivered programming.[35] Rejecting the argument "that the regulatory requirements outlined in Section 628(c) circumscribe the Commission's authority to prohibit exclusivity clauses," the Commission explained that Section 628(c) is a floor, not a ceiling: "[N]othing in these provisions [in 628(c)(2)] indicate that they were intended to establish the outer limits of the Commission's authority under Section 628(b)." *MDU Order*, 22 FCC Rcd at 20258 ¶ 48. Further, the Commission explained, "the very title of Section 628(c)(2), 'Minimum Contents of Regulations,' strongly suggests that the rules the Commission was required to implement had to cover the conduct described in Sections 628(c)(2) at the least, but that the Commission's authority under Section 628(b) was broader." *Id.* Section 628(b) reaches not only "conduct that impairs MVPDs' access to programming," but also "any practices that unfairly deny MVPDs the ability to provide such programming to consumers." *Id.* at 20256 ¶ 44; *see also id.* ("Had Congress wanted Section 628(b) to proscribe only practices denying MVPDs access to programming it could easily have done so by focusing that provision explicitly on conduct that impairs MVPDs' access to programming. Congress knew how to draft narrowly drawn provisions of that kind as evidenced by another subsection, Section 628(c)(2)."). Thus, irrespective of whether there is a sufficient basis to adopt a *general* prohibition on exclusive

[35] *See, e.g., DirecTV Order*, 15 FCC Rcd at 22807 ¶ 12; *MDU Order*, 22 FCC Rcd at 20256 ¶ 44 (Section 628(c)(2) is "narrowly drawn" and "proscribes specific conduct hindering MVPDs' access to programming").

contracts for terrestrially-delivered programming under Section 628(c)(2), the Commission can act to enforce the violation of Section 628(b) that is illustrated by the facts at issue here.

62. While granting this Complaint would advance delivery of both covered, satellite-delivered programming *and* terrestrially-delivered programming, that is irrelevant. That would have been the case in both *DirecTV* and *RCN*, but the Commission never suggested that this would disable it from acting. Further, in the *MDU Order*, the Commission found irrelevant the fact that its order would facilitate provision of terrestrially-delivered programming: "[O]ur decision to prohibit exclusivity clauses for the provision of video services to MDU owners is consistent with the focus on satellite programming because *most programming* is delivered via satellite."[36] Further, the providers who would benefit from the *MDU Order* would likely provide not only existing but new satellite-delivered programming—thus directly serving the goals of the Act.[37]

3. The Facts Here Show That Cox's Actions Directly Hinder AT&T's Ability To Offer A Viable, Alternative Video Service In San Diego.

63. There is little doubt that the facts in this case support a Section 628(b) claim. Cox's actions are intended to—and do—hinder AT&T's provision of video programming to consumers and subscribers in San Diego, most of which, of course, is satellite-delivered programming that is expressly covered under the program access rules.

64. As discussed above, the Commission has recognized repeatedly that the type of programming provided on Cox-4 is "must have" programming, without which competitive

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[36] *MDU Order*, 22 FCC Rcd at 20255 ¶ 43 n.132 (emphasis added).

[37] *See id.* at 20245 ¶ 18.

MVPDs cannot compete effectively.[38] And the withholding of Cox-4 has in fact had the anticompetitive effects discussed in the Commission's orders—lack of Padres programming has interfered with AT&T's ability to offer *any* type of video programming in San Diego, including satellite-delivered programming. AT&T has experienced significantly lower U-verse subscription numbers in San Diego than in **[highly confidential*****

*****end]**, a high rate of churn for existing customers, and a high rate of order cancellations before service has been activated. In other words, Cox's conduct has hindered AT&T's efforts to successfully serve consumers or continue to serve subscribers.

65. As noted above, there is considerable evidence that Cox is acting deliberately in order to stifle such competition. Cox trumpets its exclusive access to Padres programming in its advertising, and it has expressly conceded in the context of this dispute that it will not share Padres programming with "non-wireline or telco cable providers."[39] At the same time, however, Cox is licensing the channel to Time Warner, an incumbent cable operator that primarily serves areas adjacent to Cox's San Diego footprint. This licensing scheme demonstrates anticompetitive intent. In fact, in the *Adelphia Order*, the Commission identified such schemes as anticompetitive and imposed merger conditions designed to prevent them.[40]

66. The facts enumerated in Part V above make it clear that Cox is withholding programming for the purpose of stifling AT&T's efforts to serve as a competitive provider of satellite-delivered video programming in San Diego. Accordingly, Cox is violating Section 628(b)'s prohibition on "unfair methods of competition or unfair … acts or practices" that have

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38 *See* Part V.D, *supra*.

39 *See supra*, at ¶ 27; York Decl. ¶ 20 & Ex. 5.

40 *Adelphia Order*, 21 FCC Rcd at 8257 ¶ 120.

the purpose or effect of "hinder[ing] significantly or ... prevent[ing] any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[41]

4. The Commission Should Be Particularly Sensitive Here To A Potential Violation Of Section 628(b) Given AT&T's Role As A Wireline New Entrant, Section 706's Mandate, And The Pro-Competitive Policies Of The 1996 Act.

67. There are three additional reasons why the Commission should be particularly sensitive to a potential violation of Section 628(b) here.

68. *First*, it is particularly important to remedy the anticompetitive damage done by Cox's refusal to deal with AT&T because, as a wireline alternative to the cable incumbent, AT&T offers the type of competition that would advance the core policy mandates articulated by both Congress and the Commission for the video distribution market. *See* 47 U.S.C. § 548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market"). As a new entrant, AT&T is expanding the market beyond the two main sources of competition that consumers have seen so far—cable and DBS. AT&T stands ready to bring diversity to the market, along with the innovation and choice that new entry typically produces from all players.

69. As the Commission and numerous independent observers have recognized, wireline competitors are uniquely positioned to exercise price discipline in the cable market. In the *MDU Order*, the Commission explained that "the presence of a second wire-based MVPD competitor clearly holds prices down more effectively than is the case where DBS is the only alternative." 22 FCC Rcd at 20244-45 ¶ 17 & n.52. The Commission has noted that prices are

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41 47 U.S.C. § 548(b).

17 percent lower where wireline cable competition is present.[42] Similarly, the GAO concluded that video entry by wireline competitors provides more price discipline to cable operators than DBS and is more likely to cause cable operators to enhance their services and improve their customer service.[43] The GAO found that rates for expanded basic cable television service were typically 15 to 41 percent lower in markets with a wireline video competitor, when compared with similar markets that did not have such a competitor.[44] Thus, Cox has a particular incentive to withhold must-have programming from AT&T.[45]

70. Moreover, the impact of withholding Cox-4 is even greater on AT&T than on its DBS competitors. The marginal cost of providing service to San Diego for a DBS provider is relatively small and those providers can profitably compete for the portion of the market which lacks interest in the Padres. AT&T, on the other hand, offers U-verse TV over facilities exclusively devoted to service in San Diego, and the loss of access to a substantial portion of the subscribers there may make it uneconomic to provide video service at all. Furthermore, because it is difficult for a new entrant to succeed in the marketplace without offering potential subscribers the best programming lineup possible, *see* York Decl. ¶ 10, Cox's withholding of "must-have" programming poses a significant impediment to AT&T's ability to attain a

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[42] *See* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection & Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 21 FCC Rcd 15087, 15087-88 ¶ 2 (2006).

[43] Government Accountability Office, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry*, GAO 04-262T at 6 (Mar. 2004).

[44] Government Accountability Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 at 4 (Feb. 2004).

[45] *See 2007 Program Access Order*, 22 FCC Rcd at 17806 ¶ 24 (describing emergence of U-verse as "[a] significant development" in increasing competition for cable and citing comments on GAO study).

sufficient foothold in San Diego. As the Commission has recognized, "because new entrants 'have no established customer base,' ... they are particularly vulnerable to competitive harm if, through withholding, cable incumbents are able to degrade the quality of their programming packages."[46]

71. If Cox's anticompetitive behavior is permitted to depress competition from AT&T, the result will be less competition, less diversity, and lower-quality service for San Diego consumers—in contravention not only of Section 628(b) but also Section 601, which advocates "the widest possible diversity of information sources and services to the public" and the "promot[ion of] competition in cable communications." 47 U.S.C. § 521(4), (6).

72. *Second*, any anticompetitive effect of withholding Cox-4 from AT&T inhibits not just the provision of video service, but also the provision of broadband and advanced services. Section 706 of the Telecommunications Act of 1996 requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience, and necessity ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[47]

73. The Commission has recognized that barriers to successful competitive entry by wireline MVPDs like AT&T "discourage investment in the fiber-based infrastructure necessary for the provision of advanced broadband services" by reducing "the promise of revenues from

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46 *FCC Cablevision Brief* at 40 (quoting *2007 Program Access Order*, 22 FCC Rcd at 17820 ¶ 41).

47 Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note) ("Section 706").

video services to offset the costs of such deployment," and thus "defeat[] the congressional goal of encouraging broadband deployment."[48] Here, AT&T's inability to offer Cox-4 in San Diego reduces expected revenues from the U-verse TV service, which in turn affects the economic underpinnings of AT&T's broadband deployment in San Diego by eliminating one of the key sources of revenues expected from such deployment. The result will be to depress competition not only for video but for high-speed Internet access, VoIP, and the "triple play" of video, data, and voice. Section 706 requires the Commission to interpret its Section 628(b) authority broadly in order to encourage the deployment of advanced telecommunications services.

74. In the *MDU Order*, the Commission did exactly that. It justified its broad prohibition on anticompetitive cable practices by pointing to its obligations under Section 706. For example, the Commission explained that the prohibition on exclusivity clauses "addresses the Congressional concerns underlying Section 628(b) .... It also will promote the development of new technologies that will provide facilities-based competition to existing cable operators, and thus serves the purposes set forth in Section 628(a) (as well as other provisions of law, such as Section 706 of the Telecommunications Act of 1996)." *MDU Order*, 22 FCC Rcd at 20257 ¶ 46; *see also id.* at 20258 ¶ 47 ("[O]ur interpretation of Section 628(b) to prohibit exclusivity clauses for the provision of video services is not only consistent with the plain language of that statutory provision and confirmed by that provision's legislative history, but also furthers the broader purposes of the Act," including Section 706).

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48 Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, 5103 ¶ 3 & n.238 (2007) ("*Local Franchising Order*").

75. Here too, the Commission should view its Section 628(b) authority in light of its obligations under Section 706. Both the Commission and the D.C. Circuit have recognized that "the Commission has the authority to consider the goals of Section 706 when formulating regulations under the Act." *Local Franchising Order*, 22 FCC Rcd at 5132 ¶ 62 & n.238; *see also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004) (holding that the Commission properly considered Section 706 when deciding whether to require unbundling of fiber and hybrid loops). Here, it is clear that allowing Cox to continue to withhold Cox-4 from AT&T would thwart the purposes of Section 706.

76. *Finally*, the Commission should be particularly inclined to interpret its powers under Section 628 so as to eliminate the significant entry barrier posed by Cox's withholding of Cox-4, given the policy of the 1996 Act to encourage new entry generally. This market-opening policy has led the Commission to impose numerous obligations on AT&T to provide facilities and services to competitors seeking to enter AT&T's core line of business in San Diego. It should likewise inform the Commission's interpretations of the Act when AT&T is entering the core market of those competitors. A narrower reading of the Commission's Section 628 authority would unfairly tilt the playing field in favor of the cable incumbents, allowing them to benefit from Congress's market-opening objectives without contributing to that same end.

77. For all of the foregoing reasons, the Commission should grant AT&T's program access Complaint and hold that Cox's refusal to license Cox-4 violates Section 628(b).

B. The Commission Has Ancillary Authority To Require Cox To License Its Regional Sports Network To AT&T.

78. Even leaving aside the direct reach of Section 628(b), the Commission has ancillary authority to require Cox to deal with AT&T in order to effectuate the goals and purposes of the Act, including Title VI generally, and Sections 628 and 706 in particular.

79. Congress set out the purposes of the program access statutes in Section 628(a) of the Communications Act. That provision states:

> The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.[49]

As noted above, Congress also mandated, in Section 706, that the Commission encourage the deployment of advanced services to the public, "by utilizing, in a manner consistent with the public interest, convenience, and necessity ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

80. For the reasons discussed above, Cox's withholding of Cox-4 from AT&T and other competitive MVPDs in San Diego undermines both of these statutory provisions.

81. The Commission has ancillary authority to issue whatever orders or rules are necessary to prevent Cox's anticompetitive behavior from thwarting the purposes of Sections 628 and 706, not only under Section 628(c)(1) but also pursuant to Sections 1, 2(a), 4(i), 201(b),

[49] 47 U.S.C. § 548(a).

and 303(r) of the Communications Act.[50] Both the Commission and the Supreme Court have recognized that cable service is a proper target for exercise of the Commission's ancillary authority.[51]

82. In fact, in the *MDU Order*, the Commission relied in the alternative on its ancillary authority to effectuate Sections 628 and 706 as the basis for its rule prohibiting exclusive contract clauses. The Commission explained that "[t]he prohibition we adopt here applies to 'interstate and foreign communication by wire or radio,' advances the purposes of both the 1992 Cable Act and Section 706 of the 1996 Telecommunications Act, and serves the public interest." *MDU Order*, 22 FCC Rcd at 20261 ¶ 52.

83. In short, the Commission has ample power to grant this Complaint pursuant to Section 628(b) *and* the Commission's ancillary authority to further Sections 628 and 706.

VII. COUNT 1 — REFUSAL TO SELL PROGRAMMING IN VIOLATION OF THE COMMUNICATIONS ACT AND COMMISSION RULES

84. AT&T incorporates by reference the foregoing paragraphs as though fully stated herein.

85. Cox is engaged in unfair methods of competition and unfair and deceptive acts and practices by refusing to negotiate in good faith with AT&T for the licensing of Cox-4, while providing that programming to Time Warner, and by then advertising widely that Cox-4 is available only on cable.

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50 47 U.S.C. §§ 151, 152(a), 154(i), 201(b), 303(r).

51 *See MDU Order*, 22 FCC Rcd at 20260-61 ¶¶ 52-53; *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) (holding, prior to Congress's enactment of the Cable Act, that the Commission's regulation of cable television systems was a valid exercise of ancillary jurisdiction).

86. Because AT&T cannot compete effectively in the market for video service without providing Cox-4 to U-verse TV subscribers, Cox's refusal to license Cox-4 to AT&T has the purpose and effect of preventing AT&T from providing satellite-delivered cable programming to consumers in San Diego.

87. Cox's conduct violates Section 628(b) of the Communications Act[52] and the Commission's rules, 47 C.F.R. §§ 76.1000 *et seq.*

VIII. REQUEST FOR DISCOVERY

88. Much of the relevant evidence in this case is in Cox's possession. Accordingly, AT&T requests discovery so that it may further substantiate its claims.

IX. REQUEST FOR PROMPT DECISION

89. The Commission can and should resolve this Complaint swiftly. The key facts are straightforward and indisputable and any further delay in granting AT&T access to "must have" programming will cause significant harm to consumers and undermine Congress's objective of promoting competition and diversity in the delivery of video programming services. The Commission has stated that it will seek to resolve program access complaints involving refusals to sell "within five months of the submission of the complaint to the Commission."[53] This or a shorter time frame is appropriate here so that AT&T will at least have sufficient time to advertise the new programming well prior to the commencement of next season's spring training.

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52 47 U.S.C. § 548(b).

53 Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, 15842 ¶ 41 (1998) ("*1998 Implementation Order*"); *see also 2007 Program Access Order*, 22 FCC Rcd at 17855-57 ¶¶ 104-08 (reaffirming 5-month period for resolving program access complaints).

X. REQUEST FOR DAMAGES

90. AT&T has incurred significant costs due to the lack of Padres programming on U-verse TV. These costs fall into several distinct categories across AT&T's business, and seriously compromise AT&T's ability to launch a successful, competitive video offering.

91. First, the loss of actual and potential subscribers that AT&T suffers as a result of Cox's withholding of Padres programming increases AT&T's per-subscriber programming costs in San Diego. Video programming vendors typically charge a per-subscriber fee to MVPDs, which increases as the number of subscribers drops. Thus, as AT&T loses subscribers, it is forced to pay more in per-subscriber costs for *all* of its programming, across the board. This, of course, reduces AT&T's profit margin for any customer—and by inflating the return AT&T must make per-customer to cover its costs, it threatens to further compromise AT&T's ability to offer a viable competitive video service offering by putting upward pressure on AT&T's rates. *See* Sambar Decl. ¶ 17.

92. Second, AT&T must pay more to market and advertise U-verse TV than it would in the absence of the Padres problem. AT&T has been forced to use more targeted and sophisticated—and thus more expensive—marketing campaigns to reach the subset of San Diego consumers who will consider U-verse despite the lack of Cox-4. And because the return on this discrete group is limited, it is not clear that AT&T will fully recover those costs (or that it would have expended the resources to specifically pursue this group in the absence of the Padres issue). In addition, AT&T has been compelled to offer promotions—such as free Padres tickets or gift cards—to persuade customers to try U-verse despite the lack of Cox-4. For a time, AT&T even offered free high-definition service to consumers in San Diego with the explicit aim of attracting

fans of sports teams other than the Padres. These additional costs have burdened AT&T in San Diego, increasing its per-customer expenses and depressing its revenues accordingly. *See id.* ¶ 18.

93. Third, AT&T has been forced to bear higher transactional sales costs. Because Padres programming plays such a significant role in San Diego customers' MVPD choice, AT&T must (as described above) warn all new customers about the lack of Cox-4, and receive a customer acknowledgement of that disclosure. This increases the length of the average sales call, and imposes record-keeping and training requirements, all of which impose incremental costs on the company. *See id.* ¶ 19.

94. Fourth, and along similar lines, AT&T's customer service costs are higher as a result of dealing with increased rates of cancellation and disconnections from customers upset by the lack of Cox-4. Training and staffing costs also are incrementally higher; for example, AT&T's entire national U-verse call center team must be specially trained by personnel in San Diego regarding the lack of Padres programming. *See id.* ¶ 20.

95. In addition to these increased costs, AT&T also has suffered a loss of actual and potential customers as a result of Cox's withholding of Padres programming, as discussed above. Specifically, from September 2007 through July 2008, the unavailability of Cox-4 on U-verse TV has caused AT&T to lose nearly **[highly confidential***   ***end]** existing and potential customers. Specifically, **[highly confidential***   ***end]** potential customers chose not to sign up for U-verse service, **[highly confidential***   ***end]** potential customers cancelled their service orders for U-verse prior to installation, and **[highly**